STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Court of Appeals No. 343818

Lower Court No. 17-4120 FH

-vs-

MICHELINE NICOLE LEFFEW
Defendant-Appellant
_____/

ARENAC COUNTY PROSECUTOR/
ATTORNEY GENERAL
Attorney for Plaintiff-Appellee
_____

KATHERINE L. MARCUZ (P76625)
Attorney for Defendant-Appellant
_____

APPLICATION FOR LEAVE TO APPEAL

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Judgment Appealed From and Relief Sought

Micheline Leffew appeals the Court of Appeals' April 9, 2020 opinion affirming her conviction and sentence. (Court of Appeals per curiam opinion attached as Appendix G).

The evidence at trial established that Micheline Leffew went to pick up her mother-in-law, Lisa Seibert, from Michael Porter's house. Porter and Seibert had a sexual relationship, and Seibert had just told Porter that she no longer wanted to be with him. When Ms. Leffew got there, Seibert was ready to leave, but Porter would not let her go. From outside the house, Ms. Leffew saw Porter throw Seibert to the floor and could hear Seibert screaming and yelling. She then watched Porter drag Seibert into another room. Ms. Leffew ran around to the side of the house and kicked in a side door to come to Seibert's aid. Immediately upon entering, Porter struck Ms. Leffew in the head with a heavy, glass ashtray which cut her head in several places, knocked her to the ground and triggered a seizure. Ms. Leffew was charged and convicted of third degree home invasion for entering Porter's home without permission.

At trial, trial counsel presented an affirmative justification defense. He argued that Ms. Leffew honestly believed that Seibert was in imminent danger at the hands of Porter and thus Ms. Leffew was justified in entering Porter's home to try to assist her. Ms. Leffew testified, acknowledged doing the acts in question, and explained why she did what she did.

Although trial counsel presented a defense of others and/or necessity defense, he failed to seek a jury instruction on the affirmative defense. This failure constituted ineffective assistance of counsel because without an instruction on the affirmative defense, the jury had no guidance on how to determine whether Ms. Leffew's actions were justified under the circumstances. Moreover, trial counsel also failed to utilize key impeachment evidence that would have caused the jury to further doubt the prosecution's theory of the case and lent credibility to Ms. Leffew's version of events.

This case presents the unresolved issue of whether the traditional common law defense of defense of others may be asserted as a defense to non-assaultive otherwise criminal conduct done in the effort to protect a third person from imminent bodily harm. Here, that conduct involved damaging a door and entering a home without permission in order to protect the woman being assaulted inside.

Leave to appeal should be granted, because the Court of Appeals' decision is clearly erroneous and will cause material injustice if it is not reversed. MCR 7.302 (B)(5). In particular, the Court below clearly erred in concluding that Ms. Leffew was not entitled to assert a "defense of others" affirmative defense under the common law, in part because the statutory "defense of others" affirmative defense codified by the Self-Defense Act (SDA), MCL 780.971 *et seq* controls all self-defense and defense of others claims that occurred after the effective date of the SDA. Appendix G at 4-5. The Court further erred in concluding that, even assuming the defense was available, the failure to request a defense of others instruction would have had no effect on the verdict because the jury was instructed that to commit the misdemeanor of malicious destruction of a building, Ms. Leffew must have destroyed the property without "just cause of excuse." Appendix G at 5. This sort of prejudice analysis wholly ignores why affirmative defense jury instructions exist in the first place and would make harmless any failure to seek or provide an affirmative defense instruction where an (negative) element of the crime in question is lack of justification.

For the reasons expressed in detail in the attached brief in support, this Court should either grant leave to appeal, remand to the trial court for an evidentiary hearing, or grant any appropriate peremptory relief.

Statement of Question Presented

I. Was Ms. Leffew deprived of her constitutional right to effective assistance of counsel where her attorney unreasonably failed to request that the jury be instructed on an affirmative justification defense such as defense of others and failed to impeach the prosecution witnesses with information critical to their credibility and the resolution of the case?

Court of Appeals answers, "No."

Micheline Nicole Leffew answers, "Yes."

Statement of Facts and Material Proceedings

The Incident and Background

In September 2017, Micheline Leffew and her husband Jeremiah Leffew moved across the country from Oregon to Michigan to escape persistent wildfires in Oregon. Presentence Investigation Report (hereinafter PSIR),7. In Michigan, they stayed with Jeremiah's biological mother, Donna Knezevich and his stepmother, Lisa Seibert. I, 97-98.[1] Donna and Lisa have been a couple for more than 25 years. I, 162. In the summer of 2017, Donna and Lisa were also romantically involved with Michael Porter. I, 97.

On November 14, 2017, Lisa and Donna got into a fight which resulted in Lisa leaving the house she shared with Donna to stay with Mr. Porter. I, 163; see also Preliminary Examination Tr. 12/19/2017 at 33 (hereinafter Prelim. Tr.). Five days later, Donna called Lisa and proposed to her. I, 165. Lisa accepted and asked Donna to come get her. I, 165. Jeremiah, Donna, and Ms. Leffew drove to Mr. Porter's house. I, 238-39. When they arrived, Jeremiah honked the horn and waited for Lisa to come outside. I, 221. When Lisa did not appear after a few minutes, Ms. Leffew and Jeremiah went to the front door and knocked. I, 221.

Mr. Porter answered the door and Ms. Leffew told him that they were there to get Lisa. I, 222. Lisa was standing behind Mr. Porter putting her coat on. I, 188, 222. Ms. Leffew asked Lisa if she wanted to leave and Lisa said "yes." I, 222. See also Prelim. Tr., 37-38. Mr. Porter said, "give me few minutes" and slammed the door. I, 222. Lisa then tried to leave, but Mr. Porter grabbed her, threw her to the ground and then dragged her into the dining room.[2] I, 222-223. See

[1] References to the trial transcript are abbreviated by volume and page number.

[2] Contrary to her testimony at the preliminary examination and her multiple statements to the police, Lisa Seibert testified at trial that she believed Mr. Porter accidentally knocked her to the ground. I, 179.

also Prelim. Tr., 38. Ms. Leffew could see what was happening through the big picture window next to Mr. Porter's front door. I, 224. Ms. Leffew could also hear Lisa screaming for help. I, 224. Ms. Leffew tried to help Lisa by entering the house through the front door, but it was locked, so she ran around the back of the house and forced open the back door, which lead to the kitchen. I, 224. As Ms. Leffew entered the house, Mr. Porter hit her in the head with a glass ashtray, which cut her head in several places, knocked her to the ground and triggered a seizure.[3] I, 224-225.

Jeremiah, who had followed his wife around to the back of the house, saw her laying on the kitchen floor in a pool of blood having a seizure. I, 244. Jeremiah entered the house to help his wife. I, 244-245. Mr. Porter then attacked Jeremiah and the two men briefly fought until Jeremiah stopped the fight by brandishing a steak knife taken from the kitchen counter and pleading, "Please just stop and let us go, stop fighting." I, 245-246. Jeremiah then helped Ms. Leffew back to his car. I, 247-248. Lisa and Donna got in the car and all four drove to the hospital so Lisa and Ms. Leffew could get medical help. I, 247-248. On the way to the hospital, Ms. Leffew called 911 to ask the police to meet her there. I, 229.

Deputy Christopher Ochab of the Arenac County Sherriff's department met Ms. Leffew, Jeremiah, Lisa and Donna at St. Mary's of Standish Hospital. I, 199-200.

He took statements from Ms. Leffew and Jeremiah who reported that Mr. Porter had knocked Lisa to the floor and prevented her from leaving his house until Ms. Leffew and Jeremiah entered to rescue her. I, 201-204.

[3] Ms. Leffew has suffered from seizures since she was 11 years old. I, 225.

Trial

At trial, Lisa. Seibert testified for the prosecution and significantly changed her story from the one she told in her preliminary examination testimony. I, 162-70. Ms. Seibert testified that Mr. Porter accidently knocked her over while trying to talk her into staying at his house. I, 179. Ms. Seibert changed her story after a domestic violence incident between Jeremiah and Donna resulted in Donna's arrest. I, 183. Ms. Seibert held Jeremiah and Ms. Leffew responsible for Donna's incarceration. I, 183. Ms. Seibert also claimed that Ms. Leffew and Jeremiah pressured her into her testimony at the preliminary exam. I, 184.

On cross-examination, Ms. Seibert was confronted with her preliminary exam testimony that Mr. Porter prevented her from leaving the house and knocked her down. I, 176-79. She was further confronted with the signed statement she gave to police on the night of the incident. I, 181. Ms. Seibert's witness statement is consistent with her preliminary exam testimony – that Mr. Porter knocked her down and would not let her leave his house. I, 182. Ms. Seibert likewise testified, both at trial and the preliminary examination, that Ms. Leffew had been knocked down to the kitchen floor and had a seizure. (I, 168-169; Prelim. Tr., 39)

Mr. Porter testified that when he asked Ms. Leffew and Jeremiah for a few minutes with Ms. Seibert, they began pounding on the door and window of his house. I, 105. According to Mr. Porter, Ms. Seibert fell down, so he helped her into a chair in the dining room. I, 105-106. The back door was then kicked in and Ms. Leffew and Jeremiah entered the house. I, 108. Mr. Porter threw an ashtray at Ms. Leffew and punched Jeremiah a few times before Ms. Leffew and Jeremiah pinned Mr. Porter to the sink and Jeremiah tried to stab him with a steak knife. I, 109-110. Donna then entered the home and defused the situation. I, 111-112.

Ms. Leffew was jury convicted as charged of third-degree home invasion. II, 57.[4] The Honorable Laura A. Frawley from the Arenac County Circuit Court sentenced Ms. Leffew to five months in jail, two years of probation, restitution and court costs. Sentencing Transcript 04/16/18 at 8-12. Jeremiah was convicted as charged of first-degree home invasion and felonious assault. II, 57.

Direct Appeal, Motion to Remand, and Post-Conviction Offer of Proof

Ms. Leffew timely filed a brief and motion to remand in the Court of Appeals and made the following offer of proof in support of her request for remand for a *Ginther*[5] hearing.

The Arenac County Prosecutor's Office charged Mr. Porter with possession with intent to distribute marijuana and domestic violence against Lisa Seibert based on his actions on the night of the incident. *Second Amended Felony Complaint*, attached as Appendix A. He later pled guilty, pursuant to a pre-trial agreement, to possession of marijuana and disorderly person--jostling. See *Porter Plea Transcript*, attached as Appendix B; see also *Register of Actions, Judgment of Conviction, and Order of Dismissal*, attached as Appendix C. In consideration of his plea, the prosecution dismissed the initial charges. Appendix B; see also Appendix C. Mr. Porter was sentenced to four days in jail. See *Porter Sentencing Transcript*, attached as Appendix D.

In addition to her preliminary examination testimony and her initial statement to the police on the night of the incident, Lisa Seibert also sought a personal protection order against Mr. Porter. See *Seibert Petition for Personal Protection Order*, attached as Appendix E. As part

[4] Third degree home invasion can be committed by breaking and entering, or entering a building without permission, and committing a misdemeanor while doing so. MCL 750.110a(4)(a). Here, the prosecutor argued that Ms. Leffew committed the misdemeanor Malicious Destruction of Property less than $200 when she broke Porter's kitchen door in the process of entering the house.

[5] *People v Ginther*, 390 Mich 436 (1973).

of that application, Ms. Seibert endorsed a three-page statement, detailing the intentional and physical nature of Mr. Porter's attack on the night of the incident.

Neither Mr. Porter's criminal charges and plea agreement nor Ms. Seibert's petition for a personal protection order were used to impeach these witnesses or otherwise offered into evidence at Ms. Leffew's trial.

Undersigned counsel interviewed Ms. Leffew's trial attorney by phone on January 15, 2019, to inquire about these issues. Trial counsel reported that he had no strategic purpose for not requesting the defense of others instruction and conceded he should have requested it. Trial counsel had no recollection of Ms. Seibert's PPO or Mr. Porter's related case.

On March 12, 2019, the Court of Appeals issued an order denying the motion to remand. Appendix F.

On April 9, 2020, the Court of Appeals issued an unpublished opinion affirming Mr. Leffew's conviction and sentence. Appendix G.

Argument

1. Ms. Leffew was deprived of her constitutional right to effective assistance of counsel where her attorney unreasonably failed to request that the jury be instructed on an affirmative justification defense such as defense of others and failed to impeach the prosecution witnesses with information critical to their credibility and the resolution of the case.

Standard of Review and Issue Preservation

Ms. Leffew preserved her claim of ineffective assistance of counsel by timely filing a motion to remand under MCR 7.211(C)(1) and *People v Ginther*, 390 Mich 436 (1973). However, a claim of ineffective assistance of counsel may be raised for the first time on appeal if the details relating to the alleged ineffective assistance of counsel are sufficiently contained in the record to permit this Court to decide the issue. *People v Matuszak,* 263 Mich App 42, 48 (2004). In the absence of an evidentiary hearing in the trial court, review on appeal is limited to mistakes apparent on the lower court record. *People v Rodriguez*, 251 Mich App 10, 38 (2002).

Claims of ineffective assistance of counsel are reviewed de novo under the two-part Strickland test set forth in *Strickland v Washington*, 466 US 668 (1984). Ineffectiveness claims present mixed questions of law and fact. *Strickland,* 466 US at 698; *People v LeBlanc,* 465 Mich 575, 579 (2002). Questions of law are reviewed de novo. *LeBlanc,* 465 Mich at 579. Questions of fact are reviewed for clear error. MCR 2.613(C); *LeBlanc,* 465 Mich at 579.

The availability of an affirmative defense is a legal question that is reviewed de novo. *People v Dupree*, 486 Mich 693, 702 (2010)

Argument

Ms. Leffew did not deny that she entered Mr. Porter's home without permission. Rather, she asserted she was justified in entering Mr. Porter's home in order to save Lisa Seibert from imminent physical injury. Her attorney argued these facts at trial, yet unreasonably failed to

request that the jury be instructed on the defense of others. Deprived of this instruction, the jury never learned that Ms. Leffew was justified in entering Mr. Porter's home if she honestly and reasonably believed intervention was necessary to prevent imminent harm to Ms. Seibert at the hands of Mr. Porter.

Additionally, as described *infra,* Mr. Porter was charged with physically assaulting Ms. Seibert on the night of the incident and pled guilty to reduced charges associated with that misconduct, yet trial counsel never educed this evidence at trial. Trial counsel likewise unreasonably failed to impeach Ms. Seibert with the detailed three-page statement she made in support of her application for a personal protection order, three days after the incident.

The Sixth Amendment of the U.S. Constitution guarantees to a criminal defendant the right "to have the assistance of counsel for his defense." US Const, Am. VI. The Court has since recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland,* 466 US at 685-686. By "failing to render 'adequate legal assistance,'" a defendant's attorney can undermine the adversarial process counsel is appointed to protect, resulting in a conviction that "cannot be relied on as having produced a just result." *Id.* at 688. In order to prevail on an ineffective assistance of counsel claim, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51 (2012) (internal citations omitted).

To prove that trial counsel's conduct fell below an "objective standard of reasonableness," a convicted defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland,* 466 US at 690. To establish prejudice, "a defendant need not show that counsel's deficient conduct more

likely than not altered the outcome in the case." *Id.* at 692. Where counsel was ineffective, "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* Rather, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Here, trial counsel's errors were objectively unreasonable. But for these errors, it is reasonably likely the jury would have properly applied the defense of others instruction and concluded Ms. Leffew was justified in entering Mr. Porter's home. Counsel's failures deprived Ms. Leffew of her constitutional right to the effective assistance of counsel. A new trial is warranted. At minimum this Court should remand to the trial court to further develop the record as to counsel's representation and the impact of the foregone impeachment evidence.

A. Ms. Leffew's attorney was ineffective where her defense required the jury to conclude she was justified in entering Mr. Porter's house, yet counsel failed to request that the jury be instructed on defense of others or any other affirmative defense.

Ms. Leffew's trial counsel rendered ineffective assistance of counsel when he failed to request that the jury be instructed on the defense of others. But for trial counsel's error, there is at least a reasonable probability that the outcome of the trial would have been different. Thus, Ms. Leffew is entitled to a new trial.

1. The common-law affirmative defense of defense of others was available to Micheline Leffew.

A defendant has a right under Fifth and Sixth Amendments to a meaningful opportunity to present a complete defense. US Const, Ams V, VI, XIV; Const 1963, art 1, § 17; *California v*

Trombetta, 467 US 479, 485 (1984); *Chambers v Mississippi*, 410 US 284, 294, 302 (1973). To that end, a defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Rodriguez*, 463 Mich 466, 472 (2000). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574 (2000); MCL 768.29.

The case history indicates that the common law right to defend a third person arises from the right of self-defense. M. Bendinelli & J. Edsall, *Defense of Others: Origins, Requirements, Limitations and Ramifications*, 5 Regent U. L. Rev. 153 (1995). In essence, "the right of one to defend another is coextensive with the right of the other to defend himself." *Id*. (citing *Lovejoy v State*, 15 So 2d 300, 301 (1943); cf. *Commonwealth v Colantonio*, 577 NE2d 314, 319 (1991)). Most states have a single statute applicable to defense of others and self-defense. *Id*.

The common-law principle is that one may use act in defense of another when, under the circumstances as they appear at the time of the incident, she has an honest and reasonable belief that a third person is immediate danger of harm. *People* v *Riddle*, 47 Mich 116, 119, 120 n 8 (2002). The conduct and force employed by one who claims self-defense or defense of others must be reasonable, and the defendant cannot be the initial aggressor. *Id*. Where a defense of others claim lies within the range of the direct and circumstantial evidence, instructions on the defense must be given. *People v Kurr*, 253 Mich App 317, 326-327 (2002). Once a defendant presents a prima facie claim of self-defense or defense of others, the burden lies with the prosecution to disprove the claim beyond a reasonable doubt. *Dupree*, 486 Mich at 709-710; *People v Denson*, 500 Mich 385, 399 (2017).

"It is axiomatic that the common law affirmative defense of self-defense is embedded in our criminal jurisprudence." *Dupree*, 486 Mich at 705. Statutes must be strictly construed and

shall "not be extended by implication to abrogate established rules of common law.'" *People v Moreno*, 491 Mich 38, 46 (2012), quoting *Rusinek v Schultz, Snyder & Steele Lumber Co.*, 411 Mich 502, 508 (1981). While the Legislature may modify the common law, it must do so unambiguously and in "no uncertain terms." *Hosterman Gen. Contracting, Inc. v Hahn*, 474 Mich 66, 74 (2006), *accord, Moreno*, 491 Mich at 46. Where a statute is silent as to this common law defense, the presumption against abrogation is not overcome and the defense survives the legislation. *Dupree*, 486 Mich at 705.

This Court has applied this presumption in two recent cases to reaffirm the sustaining power that the right of self-defense holds in this state in the wake of statutory enactments. See *Dupree*, 486 Mich at 705; see also *People v Triplett*, 499 Mich 52 (2016). In *People v Dupree*, this Court held that self-defense was an available affirmative defense to a felon-in-possession charge under MCL 750.224f when the felon's temporary possession of a firearm was the result of an attempt to repel an imminent threat. *Id.* at 706. It did not read that statute's silence as to self-defense to indicate a legislative intent to make the defense unavailable; rather, the Court concluded that "[a]bsent some clear indication" in the statute that the Legislature abrogated the firmly embedded common-law affirmative defense of self-defense, the defense remains available to a defendant "if supported by sufficient evidence." *Id*. at 706.[6]

Likewise, in *People v Triplett*, this Court held that self-defense was an available affirmative defense to a carrying a concealed weapon (CCW) charge under MCL when the

[6] The Court followed a similar path in *People v Moreno*, which considered whether citizens have a right to resist unlawful arrests or other police misconduct and avoid liability for resisting and obstructing a police officer under MCL 750.81d. Since Michigan has a long common law history of allowing self-defense against unlawful police actions, MCL 750.81d's silence as to whether the Legislature intended to modify or abrogate that tradition meant self-defense survived enactment of that statute. *Moreno*, 491 Mich at 48-53. Thus, the defendant in *Moreno* could lawfully resist police officers who entered his home without a warrant. *Id.*

concealed instrument is considered a dangerous weapon only because it was used as a weapon. *Triplett*, 499 Mich at 53. Again, the Court noted that where there was "no 'clear indication' that the Legislature abrogated or modified the common-law defense of self-defense in the CCW statute" the defendant was justified in violating the CCW statute unless the prosecution disproved beyond a reasonable doubt his claim of self-defense. *Id.* at 58.

MCL 750.110a(4)(a) provides that a person is guilty of home invasion in the third degree if the person does either of the following:

> Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.

Further, MCL 750.380 states as follows: "A person shall not willfully and maliciously destroy or injure another person's house, barn, or other building or its appurtenances." "(5) If the amount of the destruction or injury is less than $200.00, a person who violates subsection (1) is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00 or 3 times the amount of the destruction or injury, whichever is greater, or both imprisonment and a fine."

This Court has not addressed whether an individual charged with home invasion or malicious destruction of a building can assert the common-law affirmative defenses of self-defense or defense of others to justify her otherwise criminal actions. And MCL 750.110 and MCL 750.380 do not address whether the common-law affirmative defenses of self-defense and defense of others are available. But, as established in *Dupree* and *Triplett*, the absence of a clear statutory recognition of the defense does not necessarily bar a defendant from relying on the defense to justify his violation of the statute.

Admittedly, this case is not on all fours with *Dupree* and *Triplett* as felon in possession and CCW are possessory offenses and home invasion and malicious destruction of a building less than $200 are not. Still, like felony-firearm and CCW, the act of home invasion or the malicious destruction of a building (used to substantiate a charge of home invasion), can be intermediary actions necessary to be able to come to the aid of a person who is being assaulted and is at risk of serious injury. Thus, if supported by sufficient evidence, these otherwise criminal acts can be justified by acting in defense of others, just as the offenses of felon in possession and CCW can be.

Moreover, a conclusion that self-defense or defense of others is an available defense to the misdemeanor malicious destruction of a building less than $200 is supported by the requirement that the defendant damaged the building without "just cause or excuse."[7] CJI2d 32.3. This language directly provides for affirmative justification defenses. Defense of others, like self-defense, is a justification defense. Justification defenses operate to exempt from punishment otherwise criminal conduct when the harm from such conduct is deemed to be "outweighed by the need to avoid an even greater harm or to further a greater societal interest.... Thus, conduct that is found to be justified is, under the circumstances, not criminal." P. Robinson, *Criminal Law Defenses* (1984) § 24(a), p 83.

[7] The elements of malicious destruction of a building are: (1) the building, or a permanent attachment thereto, belonged to someone other than the defendant; (2) the defendant destroyed or damaged the building or a permanent attachment; (3) the defendant did so knowing that it was wrong, without just cause or excuse, and with the intent to damage or destroy the property; and (4) the damage exceeded $100. CJI2d 32.3.

As acknowledged in the briefing below, trial counsel could have requested a different affirmative justification defense instruction, such as duress[8] or necessity[9], potentially to the same effect. There is considerable overlap among these subcategories. See *United States v Bailey*, 444 US 394 (1980). And "[a]ll justification defenses share a similar internal structure: special triggering circumstances permit a necessary and proportional response." *Criminal Law Defenses* at § 24(b), p 86. In *Dupree*, our Court of Appeals struggled with what to label the justification for temporary possession of a firearm if the possession is immediately necessary to protect the defendant or another from serious bodily harm. *People v Dupree*, 284 Mich App 89, 104 (2009). It observed, "there is no consensus on the proper label for this defense; courts have used the terms duress, necessity, self-defense, and justification," and noted, "several courts have recognized that, in felon-in-possession cases, the distinction between the defenses of duress and self-defense is largely immaterial." *Id*. at 104-105 (internal citations omitted). Ultimately, the court agreed with those courts who found the distinction immaterial, and, for the sake of simplicity, used the term "justification" to describe the defense at issue.[10] Subsequently, this Court granted leave and concluded that the traditional common law affirmative defense of self-defense may be "interposed" in a felon in possession case. *Dupree*, 466 Mich at 707. In light of this Court's conclusion in *Dupree*, Ms. Leffew has labeled her defense "defense of others." If

[8] "A successful duress defense excuses the defendant from criminal responsibility for an otherwise criminal act because the defendant was compelled to commit the act; the compulsion or duress overcomes the defendant's free will and his actions lack the required mens rea." *People v. Luther*, 394 Mich 619, 622 (1975). "It is sometimes characterized as a choice of evils and is applicable to situations in which it is preferable, as a matter of social policy, to permit a person to commit a crime in order to avoid a greater harm." *Dupree,* 284 Mich App at 100.

[9] Self-defense and defense of others are focused on the concept of "necessity." *People v Reese*, 491 Mich 127 (2012).

[10] In her concurring opinion, Judge Gleicher opined, "Although defendant in the instant case labeled his defense "self-defense" rather than "duress," he unquestionably presented to the jury a scenario entirely consistent with a classic duress defense." *Dupree,* 284 Mich App at 113.

this Court were to grant remand, the availability of other or additional affirmative defense instructions and trial counsel's reasons for foregoing them could be explored.

In holding that self-defense and defense of others do not apply to malicious destruction of a building or third-degree home invasion, the Court of Appeals erroneously relied on the plain language of the Self-Defense Act (SDA), MCL 780.971 *et seq.* Appendix G at 4. MCL 780.972(2), the part of the SDA that provides for "defense of others" states:

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses force other than deadly force may use force other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent unlawful use of force another individual.

As an initial matter, the Court of Appeals operated as if the statutory "defense of others" affirmative defense codified by the SDA controls all self-defense and defense of others claims that occurred after the effective date of the SDA. Appendix G at 4-5. This is wrong. Except as provided in MCL 780.972, the SDA did "not modify the common law of this state in existence on October 1, 2006 regarding the duty to retreat before using deadly force or force other than deadly force." MCL 780.973. And the SDA did "not diminish an individual's right to use deadly force or force other than deadly force in self-defense or defense of another individual as provided by the common law of this state in existence on October 1, 2006." MCL 780.974. The SDA "altered the common law of self-defense concerning the duty to retreat." *People v Conyer*, 281 Mich App 526, 530 (2008). The SDA "created a new substantive right, i.e., the right to stand one's ground and not retreat before using deadly force in certain circumstances in which a duty to retreat would have existed at common law." *Id.*

Self-defense and defense of others claims grounded in the common law do not have the same requirements as those brought under the SDA.[11] At common law, to make the plea of self-defense available, there is no requirement that the individual be somewhere "he or she has the legal right to be." MCL 780.972(2). Rather, common-law self-defense may be raised where a defendant "is free from fault" and is "a nonaggressor." *Riddle*, 467 Mich at 119, 126. As this Court noted in *People v Townes*, 391 Mich 578 (1974), "[a]lthough a wrongdoer generally may not avail himself of self-defense plea, the mere fact that defendant was allegedly engaged in committing trespass when the deceased attacked him would not necessarily constitute the defendant a wrongdoer so as to preclude defendant from raising self-defense issue." Rather, criminal activity by a defendant can only defeat a claim of self-defense if it entails the defendant acting as the aggressor, e.g., the defendant initiates a felonious assault. *Id*.

Additionally, there is nothing in the common law that indicates that a claim of self-defense or defense of others only applies to assaultive crimes. "At common law, the affirmative defense of self-defense justifies *otherwise punishable criminal conduct*, usually the killing of another person, if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself." *Dupree*, 486 Mich at 707 (emphasis added) (internal citations omitted). And Michigan courts have repeatedly found that non-assaultive crimes can be justified when done in self-defense. See e.g. *Dupree*, 486 Mich at 706 (felon in possession of a firearm); *Triplett*, 499 Mich at 53 (CCW); *People v Goree*, 296 Mich App 293, 302 (2012) (felony-firearm). Nor is the SDA apparently limited to only assaultive crimes. *See also People v*

[11] Again, this is because the SDA allows a person to stand his or her ground in self-defense and not retreat, even outside a homestead, but only if the "individual ... has not or is not engaged in the commission of a crime at the time he or she uses deadly force[.]" MCL 780.972(1).

Guajardo, 300 Mich App 26 (2013) (applying *Dupree* to hold that self-defense under the SDA, MCL 780.971 et seq, applies to felon in possession charge).

Furthermore, as a policy matter, whether a defendant can claim self-defense or defense of others as a justification for engaging in otherwise criminal conduct should not turn on the prosecutor's charging decisions. For example, if Ms. Leffew had been charged with first degree home invasion under the theory that she entered Porter's home with the intent to commit an assault, she could seek to justify the assaultive conduct at issue by asserting that she was acting in lawful defense of others.

In sum, the Court of Appeals erred in concluding that Ms. Leffew was not entitled to assert a defense of other defense under the common law given the apparent inapplicability of the SDA. The traditional common law defense of defense of defense of others was available to Ms. Leffew, it was the defense that her trial attorney argued at trial, and she was permitted to have the jury instructed on that defense.

2. It was objectively unreasonable for trial counsel to fail to request that the jury be instructed regarding the affirmative defense he presented. But for this failure, there is a reasonable probability of a different outcome.

Defense counsel's failure to request a defense of others instruction, and its corollary instruction regarding burden of proof, was objectively unreasonable. Counsel indeed argued that Ms. Leffew was justified in entering Mr. Porter's home in order to save Ms. Seibert,[12] but he failed to ensure the jury was instructed as to what constitutes proper justification. As discussed above, the defense case did not depend on a novel application of the law and a rational view of the evidence supported an instruction on the defense of others. See *United States v Johnson*, 416

[12] During summation, counsel argued, "that's where this whole crime that Ms. Leffew is charged with falls apart. She had just cause to go kick in that door and let Ms. Seibert out." II, 34.

F3d 464, 467 (CA 6, 2005) ("Where a defendant claims an affirmative defense, and that defense finds some support in the evidence and in the law, the defendant is entitled to have the claimed defense discussed in the jury instructions. This burden is not a heavy one.") (internal citations and quotation marks omitted).

As to the elements of the charged offense, third-degree home invasion, the court instructed the jury as follows:

> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant broke and entered a dwelling. It does not matter whether anything was actually broken, however, some force must have been used. Opening a door, raising a window, or taking off a screen are all examples of enough force to count as breaking. For an entry, it does not matter whether the defendant got her entire body inside. If the defendant put any part of her body into the dwelling, that is enough to count as an entry. Second, that [when] the defendant entered, was present in, or was leaving the dwelling, she committed a misdemeanor. In this case its alleged that that was Malicious Destruction of a Building under $200. (II, 52)

The court then instructed the jury on the elements of the alleged underlying misdemeanor, malicious destruction of a building under $200:

> In determining whether she committed that misdemeanor you must consider, with the evidence, and she's not charged with a misdemeanor, but you have to find that there was an intent[13] to commit a misdemeanor before you can find her guilty of the breaking and entering. And that Malicious Destruction of Property, of a Building under $200, the elements are: First, that the building or anything permanently attached to it belongs to someone else. Second, that the defendant destroyed or damaged that building or anything permanently attached to it. Third, that the defendant did this knowing that it was wrong, **without just cause of [sic] excuse**, and with the intent to damage or destroy the property, and fourth, that the extent of the damage was some amount less than $200. (II, 52-53, emphasis added)

[13] The trial court improperly instructed the jury that they merely had to conclude Ms. Leffew had the intent to commit the misdemeanor offense as the prosecution alleged in the Information that she actually committed the misdemeanor offense. However, given Ms. Leffew's admission at trial that she damaged Porter's door, this error was harmless.

The jury in Ms. Leffew's case should have received a modified version of Michigan Model Criminal Jury Instruction 7.22 Use of Nondeadly Force in Self-Defense or Defense of Others.[14] The modified instruction would have included the following principles.

> (1) The defendant claims that she acted in lawful defense of Lisa Seibert. A person has the right to act in defense of another person under certain circumstances. If a person acts in lawful defense of others, **her actions are justified,** and she is not guilty of home invasion.
>
> (2) You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful defense of Lisa Seibert. **Remember to judge the defendant's conduct according to how the circumstances appeared to her at the time she acted.**
>
> (3) First, when she acted, the defendant must have honestly and reasonably believed that she had to act to protect Lisa Seibert from the imminent unlawful use of force by another. If her belief was honest and reasonable, she could act at once to defend Lisa Seibert, **even if it turns out later that she was wrong about how much danger Lisa Seibert was in.**
>
> (4) When you decide whether the defendant's actions were honest and reasonable, you should consider whether the defendant knew about any other ways of protecting Lisa Seibert, but you may also consider how the excitement of the moment affected the choice the defendant made.
>
> (5) Third, the right to defend another person only lasts as long as it seems necessary for the purpose of protection.
>
> (6) Fourth, the person claiming self-defense must not have acted wrongfully and brought on the assault. However, if the defendant only used words, that does not prevent her from claiming self-defense if she was attacked.

[14] Modification is necessary because the model jury instruction M Crim JI 7.22 was drafted to state the essential elements of self-defense and defense of others as those affirmative defenses relate to assaultive crimes. See *People v Kupinski*, unpublished opinion of the Court of Appeals, issued June 28, 2018 (Docket No. 328572). See also Michigan Nonstandard Jury Instructions, Criminal, § 13:22, which includes a proposed instruction for self-defense as it relates to felon in possession of a firearm, there is no *model* instruction for that affirmative defense.

As a corollary to this instruction, counsel should have requested the instruction that the prosecution bore the burden of disproving, beyond a reasonable doubt, that Ms. Leffew acted in defense of Ms. Seibert. See M Crim JI 7.20.

Ms. Leffew had a constitutional right to "a properly instructed jury." *People v Mills*, 450 Mich 61 (1995). Counsel's failure to secure this right by requesting an instruction directly tied to the defense presented constituted deficient performance. There is no conceivable strategic purpose that would warrant foregoing this instruction.[15]

Ms. Leffew was prejudiced by counsel's error. At trial, Ms. Leffew argued that she entered Mr. Porter's home in order to protect Ms. Seibert from imminent harm. But the instructions provided by the court did not inform the jury as to whether Ms. Leffew's stated reasons for entering Mr. Porter's home justified her actions, if believed. What's more, the jury was not instructed that the prosecution bore the burden of disproving Ms. Leffew's affirmative defense beyond a reasonable doubt.

Without an affirmative justification defense instruction, the jury was left with no direction on how to consider the circumstances that led to Ms. Leffew entering Mr. Porter's home. Though the jury was instructed that malicious destruction of property under $200 required consideration of any "just cause" excusing the destruction, the jurors were left to their own devices to consider what constituted "just cause." II, 52. The defense of others instruction would have done just that.

[15] The Court of Appeals denied Ms. Leffew's motion to remand seeking to expand the record in support of the ineffective assistance of counsel claims. As part of her offer of proof, Ms. Leffew noted that appellate counsel spoke to trial counsel on January 15, 2019, and trial counsel acknowledged that his failure to request an affirmative defense instruction was one of omission, not one of strategy. See Statement of Facts and Material Proceedings, *supra*.

"Jurors are presumed to follow their instructions…" *People v Abraham*, 256 Mich App 265, 279 (2003); see also *People v Chapo*, 283 Mich App 360, 370 (2009). Had the jurors heard the defense of others instruction, they would have considered the events as Ms. Leffew honestly and reasonably believed them to be, making allowances for the excitement of the moment. Even assuming the jury credited Ms. Seibert's walked-back trial testimony regarding Mr. Porter's actions that night, it is reasonably likely that a properly instructed jury would have concluded that Ms. Leffew's actions were justified. Relying solely on Ms. Seibert's sanitized trial testimony of Mr. Porter's behavior that night, Ms. Leffew was confronted with the following information:

- Lisa Seibert wanted to leave Michael Porter's home and needed a ride. (I, 179, 188)
- Mr. Porter was upset and did not want her to leave. (I, 173)
- When Ms. Leffew arrived, Ms. Seibert was yelling at Mr. Porter. (I, 188)
- After Ms. Leffew knocked on the door, Mr. Porter answered. Ms. Seibert was standing behind him wearing her coat with a bag packed. (I, 174)
- At the door, Mr. Porter told Ms. Leffew he needed a few minutes to discuss the situation with Ms. Seibert. (I, 166, 174)
- Mr. Porter's hand was on Ms. Seibert's hand, which was on the doorknob. (I, 177)
- Mr. Porter was "holding" Ms. Seibert while she was yelling and trying to talk to her. (I, 177)
- Mr. Porter "knock[ed]" Ms. Seibert to the ground while trying to convince her to stay. (I, 178-179)
- Mr. Porter "sat" Ms. Seibert down in a chair, then leaned against her. (I, 180)

Given these facts, anyone would be justified in entering a home without permission in order to protect their loved one seemingly trapped inside against her will. Of course, establishing prejudice for purposes of an ineffective assistance of counsel claim does not require this Court to make such a definitive finding. Rather, this Court need only determine that it is reasonably probable that a properly instructed jury would have found Ms. Leffew's actions were justified.

Because there is at least a reasonable probability that the jury would have returned a not guilty verdict had they been given the proper instructions, prejudice is demonstrated, and Ms.

Leffew is entitled to a new trial with a properly instructed jury. This Court should grant leave to appeal or remand for an evidentiary hearing to develop the factual record necessary for appellate review of this issue and so that Ms. Leffew can move for a new trial. *People v Ginther*, 390 Mich 436, 443-444 (1973).

B. Trial counsel was ineffective where he failed to impeach the complainant with evidence of his conviction related to the events in question and failed to impeach a critical prosecution witness with her prior inconsistent statements, which would have diminished the reliability of these witnesses' trial testimony and supported Ms. Leffew's version of events.

The failure to impeach a key prosecution witness may amount to reversible error. In *People v Trakhtenberg*, this Court held that defense counsel was ineffective for several reasons including her failure to impeach the complainant with prior inconsistent statements. *Trakhtenberg*, 493 Mich at 54. Likewise, in *People v Armstrong*, 490 Mich 281, 283 (2011), this Court held that trial counsel's failure to introduce evidence, which would have undermined the credibility of the complainant, prejudiced the defendant and it remanded the case for a new trial based on ineffective assistance of counsel.

In line with *Trakhtenberg* and *Armstrong*, counsel was further ineffective here when he failed to impeach the key prosecution witnesses – Porter and Seibert – with available and probative evidence that would have severely undermined their credibility and the prosecution's theory of the case.

First, the Arenac County Prosecutor's Office charged Mr. Porter with possession with intent to distribute marijuana and domestic violence against Lisa Seibert based on his actions on the night of the incident. *Second Amended Felony Complaint*, see Appendix A.[16] He later pled

[16] Appendices A through E were attached the to the Motion to Remand filed in the Court of Appeals.

guilty, pursuant to a pre-trial agreement, to possession of marijuana and disorderly person--jostling. See *Porter Plea Transcript*, attached as Appendix B; see also *Register of Actions, Judgment of Conviction, and Order of Dismissal*, attached as Appendix C. In consideration of his plea, the prosecution dismissed the initial charges. Appendix B; see also Appendix C. Mr. Porter was sentenced to four days in jail. See *Porter Sentencing Transcript*, attached as Appendix D.

In addition to her preliminary examination testimony and her initial statement to the police on the night of the incident, Lisa Seibert also sought a personal protection order against Mr. Porter. See *Seibert Petition for Personal Protection Order*, attached as Appendix E. As part of that application, Ms. Seibert endorsed a three-page statement, detailing the intentional and physical nature of Mr. Porter's attack on the night of the incident.

Neither Mr. Porter's criminal charges and plea agreement nor Ms. Seibert's petition for a personal protection order were used to impeach these witnesses or otherwise offered into evidence at Ms. Leffew's trial. The Court of Appeals denied Ms. Leffew's timely filed motion to remand (see Appendix F) and in its April 9, 2020 unpublished opinion, again concluded "that remand for a *Ginther* hearing or to expand the record is not necessary." Appendix G at 6.[17]

1. Mr. Porter's related conviction.

Counsel failed to elicit that Mr. Porter, the purported victim in the case at hand, was also charged with domestic violence against Lisa Siebert as a result of this incident. See Appendix A. On December 12, 2017, less than a month after the alleged incident, he pled guilty to a reduced charge – disorderly person-jostling – as well as marijuana possession. See Appendices B and C.

[17] Without an opportunity to establish that her trial counsel's failure to impeach Seibert and Porter was largely the result of a failure to investigate, the Court of Appeals assumed that counsel's failure to develop Ms. Leffew's defense by adequately impeaching the complaining witnesses was a matter of trial strategy. Appendix G at 6. Remand is necessary so Ms. Leffew can prove otherwise.

At his plea hearing, Mr. Porter established a nondescript factual basis for his offense (an "argument" that "became somehow physical") and identified "Lisa Seibert" as his victim. See Appendix B at 6-7.

Mr. Porter's domestic violence arrest is part of the *res gestate* of Ms. Leffew's alleged crime. Accordingly, counsel was free to explore the contours of Mr. Porter's plea deal on cross-examination, not as it related to his character for truthfulness, but as proof of Mr. Porter's bias or motive. See *People v Hall*, 174 Mich App 686 (1989) ("The fact that a prosecution witness has charges pending is particularly relevant to the issue of the witness' interest in testifying and may be admitted for this purpose."); see also *People v Manning,* 434 Mich 1, 12 (1990) ("The rule that allows the factfinder to consider evidence of a guilty plea agreement is permissive and is based on the premise that the jury is ordinarily entitled to know of facts relevant to bias and motive for testimony.").

In *People v Layher*,[18] this Court explained, "evidence of bias arising from past arrest without conviction is admissible if relevant, as long as its probative value is not substantially outweighed by the danger of unfair prejudice." *Layher,* 464 Mich 756, 761 (2001). Here, Mr. Porter was charged with making an assault or battery on Ms. Seibert during the same incident for which Mr. and Mrs. Leffew stood trial and where Mr. Porter's actions were a disputed matter and central to assessing Ms. Leffew's affirmative defense. Moreover, the charges against Mr. Porter were not voluntarily dismissed by the prosecutor. Rather, Mr. Porter pled guilty to a lesser offense in exchange for dismissal of the greater offense. Further at the time of his testimony in Ms. Leffew's case, he remained on probation for that conviction, which the jury could

[18] In *Layher*, the prosecution was allowed to impeach an investigator called by the defense for bias due to his prior arrest and acquittal for a criminal sexual conduct offense involving a child under the age of thirteen.

reasonably have determined provided some motivation for Mr. Porter to cooperate with authorities. See Appendix D.[19] The probative value of Mr. Porter's arrest in this case is strong, as it directly relates to the contested issue upon which Ms. Leffew's conviction turned: whether she was justified in entering Mr. Porter's home in order to prevent him from imminently harming Ms. Seibert.

The Court of Appeals made several errors in analyzing the importance of this evidence. First the Court of Appeals erred in concluding that Porter's guilty plea was not material because "the jury was given substantial evidence regarding why Micheline believed she was justified in entering the home." Appendix G at 6. That may be the case, but still the jury had to decide whether Micheline's beliefs were reasonable to decide whether her actions were justified. That the Arenac County Prosecutor charged Porter with domestic violence on Lisa is significant and independent evidence that Micheline witnessed an assault and was concerned about Lisa's safety. Notably, at trial, the prosecutor vehemently denied that Porter had assaulted anyone. In rebuttal summation, he argued:

> Mr. Porter knew [the police] were on their way, he just didn't know how long it was going to take them. So he's not assaulting [Lisa]. Is he talking to her? Sure. Is she sitting in the chair? Sure. Is he leaning over her? Probably, but there's no assault, he's trying to talk her into staying because there was [sic] issues . . . (II, 36)

Had defense counsel elicited evidence of Porter's own criminal charges, this species of argument would have been far less persuasive, if made at all.

Second, the Court of Appeals mischaracterized the factual basis Porter gave in support of his plea. Appendix G at 6. Though Porter did begin by explaining his actions by stating that he

[19] Additionally, the preliminary exam in this case, at which Porter testified, took place on December 19, 2017-just one week after Porter's plea and approximately two weeks before his sentencing date.

got into an argument "people that were breaking in[to] [his] home," he later acknowledged that the victim of the crime was Lisa Seibert. Appendix B at 5, 7.[20] Finally, the Court of Appeals was wrong in suggesting that "delving into Porter's charges and the plea agreement may well have presented the jury with additional evidence supporting the charges." Appendix G at 6. Porter did not say anything during the plea colloquy that he didn't say during his testimony. There was no "additional evidence" there.

This case turned on what Porter did to Lisa while Micheline and Jeremiah watched. Micheline admitted entering the home without permission, but argued she was justified because of what she saw inside. Porter told a different story. The fact that Mr. Porter pled guilty to an offense – where, by his own admission during the plea colloquy, Lisa Seibert was the victim – was relevant evidence the jury should have heard. There is no possible strategic purpose for choosing to forego this impeachment of Mr. Porter. It is simply an unreasonable missed opportunity by trial counsel, which amounted to deficient performance.

Mr. Porter's motivation to testify, and his assertion that he never assaulted Ms. Seibert, thereby diminishing Ms. Leffew's defense of others claim, was central to the prosecution's case against Ms. Leffew. Had the jury learned of Mr. Porter's arrest and guilty plea, it is reasonably probable they would have acquitted. That the Arenac County Prosecutor charged Mr. Porter with domestic violence, and accepted his plea to a lesser offense, is directly in line with Ms. Leffew's defense theory and contradictory to the prosecution theory at trial.

Further, at sentencing, Mr. Porter's attorney advocated for a lenient sentence, in part, based on his cooperation with the "the prosecution with respect to the breaking of his home." See Appendix D at 4. The jury should have heard that Mr. Porter was charged for his role in the

[20] The domestic violence count against Lisa was reduced to disorderly person-jostling against Lisa. Appendix A and B.

incident and pled to a lesser charge, receiving a lenient sentence of only four days in jail plus probation. These facts are relevant to his bias and his motive to cooperate with the prosecution. See *People v Martzke*, 251 Mich App 282, 290-292 (2002), ("evidence of bias is 'always relevant' on cross-examination…"); see also *People v Sholl*, 453 Mich 730, 741 (1996), (a jury is entitled to learn "the full context in which disputed events took place.").

2. Lisa Seibert's prior inconsistent statement.

As discussed *infra*, Ms. Seibert's account of the incident changed significantly between the preliminary examination in December 2017 and the March 2018 trial. In short, while she testified at the preliminary examination that Mr. Porter forcibly prevented her from leaving his home and aggressively threw her to the ground, she testified at trial that Mr. Porter knocked her to the ground accidentally, and asserted that she had embellished his aggression in her prior statements at the behest of Jeremiah and Ms. Leffew. Collectively, the defense attorneys for Ms. Leffew and Jeremiah attempted to impeach Ms. Seibert's with her preliminary examination testimony as well as her initial statement to police on the night of the incident.

However, both attorneys failed to utilize an additional prior inconsistent statement from Ms. Seibert – her petition for a personal protection order against Mr. Porter, filed on November 21, 2017, just three days after the incident in question. See Appendix E. In this statement, Ms. Seibert provided even more egregious details of Mr. Porter's actions that night. For example, she asserted in her petition that Mr. Porter's actions got worse when Ms. Leffew and Jeremiah arrived, and that he told Jeremiah and Ms. Leffew that Ms. Seibert was not going to leave. See Appendix E; (compare with her unimpeached trial testimony, "he just told them please give me a few minutes to talk to her and it would be all right." (I, 174)). She further asserted in her petition – in direct conflict with her trial testimony – that Ms. Leffew and Jeremiah could see Mr. Porter

through the sliding door "manhandling" her in the chair, and therefore tried to get in and help her. See Appendix E; (compare with her unimpeached trial testimony, "I sat in a chair and he kind of stood in front of me and that's when they were beating the backdoor in…" (I, 167)).

Impeachment through this prior inconsistent statement is not merely cumulative to the impeachment accomplished at trial from Ms. Seibert's preliminary examination testimony and the Court of Appeals was wrong to conclude that it would have been. Appendix G at 6-7. As explained *infra*, Ms. Seibert's petition contained additional impeachment on key points not attacked by the defense at trial – namely, what Mr. Porter told Ms. Leffew and Jeremiah at the door, Mr. Porter's actions while she was in the chair, and whether Ms. Leffew and Jeremiah saw what he was doing at that time. In *Armstrong*, this Court rebuked the prosecution's assertion that counsel's failure to impeach the complainant with phone records was not prejudicial because the witness had already been impeached and held that there was a reasonable probability that the omitted impeachment evidence "would have tipped the scales in favor of finding reasonable doubt about defendant's guilt." 490 Mich at 292. Here, evidence that Ms. Seibert went to the police station three days after the dust had settled and requested a personal protection order against Mr. Porter, as well as the additional points of impeachment within her petition "would have tipped the scales in favor of finding" that Mr. Porter in fact attacked Ms. Seibert on the night of the incident and that Ms. Leffew was justified in entering Mr. Porter's home. *Id.* at 292.

Trial counsel's failure to request an instruction essential to the jury's fair consideration of Ms. Leffew's defense and his failure to elicit facts central to that defense, constitute deficient performance. These errors, individually and collectively, undermine the reliability of Ms. Leffew's guilty verdict. Accordingly, justice requires a new trial.

Summary and Relief

WHEREFORE, for the foregoing reasons, Micheline Nicole Leffew asks that this Honorable Court grant this application for leave to appeal, remand for an evidentiary hearing, or grant any appropriate peremptory relief.

Respectfully submitted,

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BY:_____

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